Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1998

In re: DAVID P. PARKER, SR.,
Debtor.

McCLELLAN FEDERAL CREDIT UNION,
Petitioner,

v.

DAVID P. PARKER, SR.,
Respondent.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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47 pp

QUESTION PRESENTED FOR REVIEW

The Question Presented for Review is as follows:

Whether Section 521(2)(B) of the Bankruptcy Code requires a debtor to perform his stated intention with respect to property pledged as security for a consumer debt, as specified in the debtor's statement of intention required by Section 521(2)(A) of the Bankruptcy Code.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Appellant - McClellan Federal Credit Union.
Appellee - David Parker, Sr.

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OPINIONS BELOW

The Credit Union appeared at the reaffirmation hearing on July 19, 1995. The Bankruptcy Court's order was not published and was contained only in a minute order from the Court. Thereafter, Credit Union timely filed an appeal of the Bankruptcy Court's decision to deny approval of the reaffirmation agreement between the Credit Union and the Debtor.

The Bankruptcy Appellate Panel ("BAP") for the Ninth circuit determined that the Credit Union did not have "standing" as an "aggrieved party" to appeal the Bankruptcy Court's denial of the reaffirmation agreement. That case is reported at McClellan Federal Credit Union v. David P. Parker, Sr., (In re David P. Parker, Sr.) 193 B.R. 525 (B.A.P. 9th Cir. 1996).

The Credit Union timely appealed the decision of the Bankruptcy Appellate Panel for the Ninth circuit to the Court of Appeals for the Ninth circuit. That case is reported at McClellan Federal Credit Union v. David P. Parker, Sr., (In re David P. Parker, Sr.) 139 F.3d 668 (9th Cir. Cal. 1998) (hereinafter referred to as "Parker").

A Petition for Rehearing and Suggestion for Rehearing En Banc was timely filed by the Credit Union with the Court of Appeals for the Ninth circuit, which Petition was denied on July 7, 1998.

STATEMENT OF JURISDICTION

This Appeal seeks review of the decision of the United States Court of Appeals for the Ninth circuit decided March 17, 1998. A motion for rehearing was made by McClellan Federal Credit Union, which petition for rehearing of the decision of the United States Court of Appeals for the Ninth circuit was denied on July 7, 1998.

The Court has jurisdiction in the matter under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED ON APPEAL

The Statute involved in this review on appeal is 11 U.S.C. Section 521. That Section states so far as pertinent -

Sec. 521. Debtor's duties

The debtor shall--

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate--

(A) within thirty days after the date of the filing

of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title; . . . ." (11 U.S.C. § 521(2).)

STATEMENT OF THE CASE

The Debtor, David Parker, Sr., filed a petition for relief pursuant to Chapter 7 of the Bankruptcy Code on April 28, 1995, which is a proceeding embodied in U. S. Bankruptcy Court, Eastern District of California, Sacramento Division Case Number 95-1828-C-7. Parker filed the bankruptcy proceeding pro se. One of Parker's creditors in the bankruptcy proceeding is McClellan Federal Credit Union (the "Credit Union").

Following the filing of the Voluntary Petition and negotiations with representatives of the Credit Union, Parker proposed to reaffirm an unsecured obligation in the amount of $1,986.50 and the secured debt in the amount of $9,977.56.

Pursuant to Section 524(d)(6) of the Bankruptcy Code, a hearing before the Bankruptcy Court was required and was scheduled and held on Monday, July 19, 1995 on the 9:30 a.m. calendar in Department C of the U. S. Bankruptcy Court for the Eastern District of California, in Sacramento, California, before the Honorable Christopher M. Klein. At the conclusion of the hearing on the reaffirmation agreement with the Credit Union, Judge Klein declined to approve the reaffirmation agreement.

The Credit Union appealed the decision of the Bankruptcy Court to the Bankruptcy Appellate Panel for the Ninth circuit. The Bankruptcy Appellate Panel for the Ninth circuit ("BAP") had jurisdiction over the appeal from the Bankruptcy

Court pursuant to 11 U.S.C. sec. 158(b). The BAP heard oral argument on February 22, 1996 at Sacramento, California, and on March 14, 1996, entered its opinion. The Bankruptcy Appellate Panel for the Ninth circuit (the "BAP") held, inter alia, that the Credit Union did not have standing to pursue the decision of the Bankruptcy Court. McClellan Federal Credit Union v. David P. Parker, Sr., (In re David P. Parker, Sr.) 193 B.R. 525 (B.A.P. 9th Cir. 1996).

An appeal was taken from the decision of the BAP to the Court of Appeals for the Ninth circuit on the issue of whether the Credit Union had standing to challenge the denial of the reaffirmation agreement and whether the denial of the reaffirmation by the Bankruptcy Court was improper in the light of Section 521(2)(B) of the Bankruptcy Code. McClellan Federal Credit Union v. David P. Parker, Sr., (In re David P. Parker, Sr.) 139 F.3d 668 (9th Cir. Cal. 1998). The Court of Appeals for the Ninth circuit held that ". . . the Credit Union was an `aggrieved person' and had standing to appeal the bankruptcy court's refusal to approve the reaffirmation agreement." McClellan Federal Credit Union v. David P. Parker, Sr., (In re David P. Parker, Sr.), supra, at 671. However, on the issue of denial of the reaffirmation agreement, the Court of Appeals determined that the debtor could retain the collateral without reaffirming the obligation with the Credit Union. McClellan Federal Credit Union v. David P. Parker, Sr., (In re David P. Parker, Sr.), supra, at 673.

The Credit Union timely filed a Petition for rehearing and a suggestion for a rehearing en banc which request was denied on July 7, 1998.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE OPINION BELOW IGNORES THE PLAIN MEANING OF SECTION 521(2) OF THE BANKRUPTCY CODE WHICH REQUIRES THE DEBTOR, AS AN ESSENTIAL PART OF THE DEBTOR'S PLEADINGS, TO STATE HIS INTENTIONS WITH RESPECT TO CONSUMER PROPERTY PLEDGED AS COLLATERAL FOR A LOAN AND, THEREAFTER, TO PERFORM HIS INTENTIONS WITH RESPECT TO CONSUMER PROPERTY PLEDGED AS COLLATERAL FOR A LOAN.

Section 521(2) provides in part as follows:

Sec. 521. Debtor's duties

The debtor shall--

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate--

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title; . . . ." (Emphasis added.) (11 U.S.C. § 521(2).)

The statement of intention is required by the Federal Rules of Bankruptcy Procedure. See Federal Rules of Bankruptcy Procedure, Rule 1007(b)(2).

In the Parker case, the Court of Appeals for the Ninth circuit stated that it finds the text of Section 521(2) to be

"unambiguous." McClellan Federal Credit Union v. David P. Parker, Sr., (In re David P. Parker, Sr.), supra. 139 F.3d at 673. Notwithstanding this determination, the Parker Court, without discussion determined that the debtor need not perform his intention as required by Section 521(2)(B) of the Bankruptcy Code.

Section 521(2)(B) of the Bankruptcy Code clearly requires the debtor to perform his stated intention with respect to consumer property he wants to retain.

Without comment, the court in Parker ignored well-reasoned decisions within the Ninth circuit that held that Section 521(2)(B) required action by the debtor. See, e.g., Ford Motor Credit Co. v. Polk (In re Polk), 76 B.R. 148, 150 (9th Cir. BAP 1987); In re Chavarria, 117 B.R. 582, 584-85 (Bankr.D.Idaho 1990); and In re Stevens, 85 B.R. 854, 855 (Bankr.D.Idaho 1988).

The dispute between the circuits, infra, regarding the clarity or ambiguity of provisions of Section 521(2) of the Bankruptcy Code turns on whether the circuit reads and gives effect to the "plain meaning" of the statute or finds ambiguity and, thereafter, looks to the principles of statutory construction and the legislative history of Section 521(2) of the Bankruptcy Code. At some point, the question of whether the statute is clear or is ambiguous must be resolved. If the provisions of Section 521(2) are clear, the courts holding the statute ambiguous must be advised of and instructed to follow Justice Frankfurter's three rules of statutory construction: "(1)

Read the statute!; (2) Read the statute!; (3) Read the statute!" See Friendly, Benchmarks (1967) "Mr. Justice Frankfurter and Reading of Statutes," p. 202. Where statutes are clear, courts are not permitted to search out legislative controversy and engage in judicial redaction of the statute to bring it into conformity with their view of the more correct legislative policy. Union Bank v. Wolas, 502 U.S. 151, 163-164 (1991); In re Znider, 150 B.R. 239, at 243 (Bkrtcy.C.D.Cal. 1993).

The Parker Court failed to follow the plain meaning of Section 521(2)(B) of the Bankruptcy Code and the Court should grant this Petition for Writ of Certiorari to review the Court's decision in Parker.

II. THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE NINTH CIRCUIT CONFLICTS AND AGGRAVATES THE EXISTING SPLIT OF AUTHORITY.

Prior to the decision in McClellan Federal Credit Union v. David P. Parker, Sr., (In re David P. Parker, Sr.), the circuits were evenly split as to whether a debtor could "retain" property that was pledged for a consumer loan without complying with the provisions of Section 521(2)(B) by redeeming the property or by reaffirming the obligation. The Second, Fourth, and Tenth circuits had held that debtors who are current on their loan payments on secured property may elect to retain the property without a reaffirmation agreement

and continue to make the payments specified in the contracts with the creditor. See Capital Communications Fed. Credit Union v. Boodrow (In re Boodrow), 126 F.3d 43, 47 (2d Cir.1997) (quotations omitted), cert. denied, _ U.S. _; Home Owners Funding Corp. v. Belanger (In re Belanger), 962 F.2d 345, 347 (4th Cir.1992); Lowry Fed. Credit Union v. West, 882 F.2d 1543, 1547 (10th Cir.1989). By contrast, the Fifth, Eleventh, and Seventh circuits held that the debtor must comply with the provisions of Section 521(2)(B) of the Bankruptcy Code and either reaffirm or redeem the collateral pledged for a consumer loan. See Johnson v. Sun Fin. Co. (In re Johnson), 89 F.3d 249, 252 (5th Cir.1996) (per curiam); Taylor v. AGE Fed. Credit Union (In re Taylor), 3 F.3d 1512, 1516 (11th Cir.1993); In re Edwards, 901 F.2d 1383, 1387 (7th Cir.1990).

McClellan Federal Credit Union v. David P. Parker, Sr., (In re David P. Parker, Sr.), as decided by the Court of Appeals for the Ninth circuit changes the balance among the circuits exacerbating the harm to financial institutions by the construction given to Section 521(2)(A) and (B).

For this reason, this Petition for Writ of Certiorari should be granted to resolve the dispute among the circuits and to resolve the inconsistent holdings between the circuits.

III. THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE NINTH CIRCUIT IS ERRONEOUS.

In Parker the decision of the Court of Appeals for the Ninth circuit provides that the Section 521(2)(A) and 521(2)(B) is unambiguous. Nonetheless, it ignores the plain meaning of the provisions of Section 521(2) of the Bankruptcy Code that require the debtor who wishes to retain collateral pledged for a consumer loan to either surrender or redeem the collateral pledged for a consumer loan or to enter into a reaffirmation agreement with the secured creditor. The Court of Appeals for the Ninth circuit disregards the admittedly unambiguous mandatory language of Section 521(2)(B) of the Bankruptcy Code in favor of a construction that erroneously invokes rules of construction to reach an end that it favors.

The Parker Court's decision with regard to Section 521(2)(B) of the Bankruptcy Code is reached by a complete disregard of and discussion of the mandatory requirement of Section 521(2)(B) of the Bankruptcy Code. The Parker Court's decision involves a tortured reading of Section 521(2)(C) of the Bankruptcy Code as it relates to Section 521(2)(B) and misplaced reading of and reliance on Mayton v. Sears, Roebuck & Co. (In re Mayton), 208 B.R. 61 (B.A.P. 9th Cir. 1997) ("Mayton"). Further, in the light of the Parker Court's statement that Section 521(2) is unambiguous, the Parker Court's decision is a complete disregard for the rules of statutory construction.

Finally, the discussion as to Section 521(2)(C) and its effect on Section 521(2)(A) and (B) of the Bankruptcy Code

in Mayton is dictum. The question in Mayton was whether the bankruptcy court properly entered an order requiring an amended statement of intention. Indeed, the dissent in Mayton would have reversed the BAP ". . . because the [bankruptcy] court's order exceeded the scope of its authority" and the statutory deadlines to file, amend and perform a Statement of Intention had expired before the creditor in Mayton filed its motion. Mayton v. Sears, Roebuck & Co. (In re Mayton), supra, at 68 (B.A.P. 9th Cir. 1997).

The decision of the Court of Appeals in Parker is clearly erroneous and must be addressed.

IV. THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE BALANCE STRUCK WITH REGARD TO SECTION 521(2)(B) OF THE BANKRUPTCY CODE AND "RETENTION" IS HARMFUL TO FINANCIAL INSTITUTIONS AND TO THE INTERESTS OF DEBTORS.

It has been argued by some authorities that reaffirmation agreements limit the benefit of the "fresh start" to a debtor with the implication that "retention" without reaffirmation is a part of the "fresh start." Moreover, it has been suggested that a debtor who voluntarily pays an obligation pursuant to Section 524(f) of the Bankruptcy Code is a good credit risk.

Such a posture is wrongheaded and ignores the reality of

the financial institution's position following discharge of a secured debt. It ignores the fact that debts that are discharged without a reaffirmation agreement are required by financial institutions' regulators to be charged off by the affected financial institutions. As a result of the entry of an order discharging the debtor, unreaffirmed loans are not recorded on the general ledgers of financial institutions as an asset. The reasoning of the courts in the Second, Fourth, Ninth and Tenth circuits ignores the fact that the debtor does not have contractual liability for such a debt. It ignores the fact that financial institutions' regulators require payments on such discharged and charged off obligations to be treated as a recovery of a loss. It ignores the fact that such debts are not reported to consumer credit reporting agencies. It ignores the fact that the debtor has transferred all of the risk of loss and devaluation of the collateral to the financial institution. Such a transfer of risk by tortured reading of Section 521(2) of the Bankruptcy Code is not at the heart of the "fresh start" concept of the Bankruptcy Code.

Moreover, the decisions of the Second, Fourth, Ninth and Tenth circuits ignore the fact that reaffirmation agreements assist in reestablishing the credit history of a debtor. At a time when financial institutions are "risk-rating" loans to consumers, reestablishing credit pursuant to a reaffirmation agreement that provides for a particular creditor "to restore the debtors to members in good standing with the creditor and, further [provides] that the creditor agrees that if debtor

pays the account by making timely payments to creditor, if debtor should apply for credit with the creditor, the creditor agrees to disregard the occurrence of the debtor's bankruptcy proceeding and will apply its usual credit standards in considering any application for credit from creditor by debtor" is a substantial benefit and, in fact, furthers the advantages of the "fresh start" to the debtor. It is an avenue open to the debtor that avoids the higher cost of credit to debtors who must purchase cars and other secured goods on credit. See In re Peacock, 87 B.R. 657, AT 660 (Bankr.D.Colo. 1988). Further, at a time when a credit card is required to rent a car, to make a reservation or to gain access to the internet, reaffirmation of unsecured debt with a guarantee of a continued use of a credit card, without posting collateral, is a benefit to the debtor and part of the bankruptcy planning process.

Contrary to the view of the Court in Parker, reaffirmation agreements, properly and carefully used, are a part of and not antithetical to the "fresh start" for the debtor.

CONCLUSION

This case presents a question of exceptional importance to both debtors and creditors. The question presented as decided by the Court of Appeals for the Second, Fourth, Ninth and Tenth circuits is erroneous and harms both the interests of financial institutions and debtors. The decision of the Courts

of Appeal for the Fifth, Eleventh, and Seventh circuits is the correct and more balanced approach to the issue of retention of collateral by the debtor. The Court in granting this Petition for a Writ of Certiorari can settle a dispute as to the plain meaning of Section 521(2) of the Bankruptcy Code, correct a misunderstanding as to the effect of a reaffirmation agreement on the "fresh start" accorded to debtors and provide for continuity of decision among the Courts of Appeal.

Accordingly, McClellan Federal Credit Union respectfully requests that their petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: DAVID P. PARKER., SR.,
Debtor.

MCCLELLAN FEDERAL CREDIT UNION,

Appellant,

v.

DAVID P. PARKER, SR.,
Appellee.

No. 96-15784
BAP No.
EC-95-1828-
RBMe

OPINION

Appeal from the
United States Bankruptcy Appellate Panel
of the Ninth Circuit

Argued and Submitted
June 11, 1997--San Francisco, CA

Filed March 17, 1998

Appendix 1

Before: Dorothy W. Nelson, Robert Boochever, and Stephen S. Trott, Circuit Judges.

OPINION

BOOCHEVER, Circuit Judge:

A debtor in Chapter 7 bankruptcy entered into a reaffirmation of his debts with a credit union. The bankruptcy court refused to approve the reaffirmation agreement, and the credit union appealed. The bankruptcy appellate panel held that the credit union did not have standing, and dismissed the appeal. Because we conclude that the credit union has standing, we consider the substantive issue of law, briefed and argued by the parties, whether 11 U.S.C. S 521(2)(A) requires a Chapter 7 bankruptcy debtor who wishes to retain property securing a debt to reaffirm the debt or redeem the property securing the debt.

FACTS

On April 28, 1995, David P. Parker, Sr., filed a Chapter 7 bankruptcy petition in the bankruptcy court for the Eastern District of California. Parker was not represented by counsel. Among other debts, he owed the McClellan Federal Credit Union (the "Credit Union") an unsecured debt of $1,986.50 on a credit card, and a secured debt of $9,977.56,

with collateral of an automobile worth between $9,000 and $10,000.

Parker filed a statement of intention under 11 U.S.C. § 521, stating his desire to reaffirm his secured loan. Still unrepresented by counsel, he executed a reaffirmation agreement with the Credit Union. In the agreement, Parker reaffirmed his secured car debt in full, and reaffirmed $1,500 of the unsecured credit card debt. In consideration of his reaffirmation, the Credit Union reduced the balance of the unsecured debt from $1,986.50 to the $1,500 as reaffirmed, and reduced the monthly payment on the secured car debt from $308.73 to $280. The Credit Union also agreed that upon his discharge in the bankruptcy proceeding, Parker would be reinstated as a member in good standing at the Credit Union, and if full payment were timely made on the secured account, the Credit Union would disregard the debt in considering any future loan application. In turn, Parker agreed that his bankruptcy discharge would not affect his obligations.

Parker filed the reaffirmation agreement, and the court scheduled a hearing on the agreement under 11 U.S.C. S 524(c)(6), which provides that a reaffirmation agreement is enforceable only if:

> (6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this

subsection, the court approves such agreement as--

> (i) not imposing an undue hardship on the debtor or a dependent of the debtor; and
>
> (ii) in the best interest of the debtor.

At the hearing, the bankruptcy court stated:

> . . . . I am not going to approve the reaffirmation agreement, particularly when it rolls in unsecured debt. Even if it does reduce your monthly payment by what appears to be some amount, but not a great amount. And my understanding of the law is, that as Long as you keep paying for that automobile, you--that probably would mean that the [sic] original monthly rate you get to keep it. And so then it's your choice as to how you want to proceed.
>
> . . . .
>
> I am not going to approve the reaffirmation agreement. Mr. Parker, if you want to keep your car, keep paying for it. If you want to

> preserve good credit with McClellan Federal Credit Union, pay them the debt that was discharged. I am just not going to make you do it.

The court granted Parker a discharge, which included his Credit Union debts.

The Credit Union appealed to the Bankruptcy Appellate Panel ("BAP"), which held that the Credit Union did not have standing to bring the appeal, and dismissed it. *McClellan Fed. Credit Union v. Parker (In re Parker)*, 193 B.R. 525 (B.A.P. 9th Cir. 1996). The Credit Union appeals.

I. *Standing*

[1] This court reviews the legal conclusions of the BAP de novo. *Alsberg v. Robertson (In re Alsberg)*, 68 F.3d 312, 314 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1568 (1996). To have standing to appeal a decision of the bankruptcy court, an appellant must show that it is a "person aggrieved" who was "directly and adversely affected pecuniarily by an order of the bankruptcy court . . . . [The] order [must] diminish [the appellant's] property, increase [its] burdens, or detrimentally affect [its] rights." *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 442-43 (9th Cir. 1983); *see Everex Sys., Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 675 (9th Cir. 1996). Whether an appellant is a person aggrieved is a

question of fact, which this court reviews for clear error. If, however, the district court did not make a factual finding on the issue, and the relevant facts and evidence are before this court, we may determine the issue ourselves. *See Fidelity Bank v. M.M. Group, Inc.*, 77 F.3d 880, 882 (6th Cir. 1996); *Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 585 (7th Cir. 1994) (where district court did not make factual finding, court of appeals may review evidence to recognize standing).

Section 521 of the Bankruptcy Code describes the individual debtor's duties in a bankruptcy case:

> (2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate--
>
> > (A) within thirty days after the date of the filing of a petition under Chapter 7 of this title . . . the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

> (B) within forty-five days after the filing of a notice of intent under this section . . . the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph . . . .

11 U.S.C. S 521(2). Parker elected to reaffirm his debts.

[2] The Credit Union stood to profit from the reaffirmation agreement. By entering into the agreement, the Credit Union sought to recover the full balance of Parker's car loan should he fail to make future payments. Without the agreement, the Credit Union's only recourse in the event of missed payments was the repossession of the vehicle. At the time the agreement was executed, the vehicle was worth between $9,000 and $10,000, and the outstanding loan was $9,977.56, only $22.56 short of the highest estimated value of the car. The car was thus very likely worth less than the loan balance, and such a disparity would increase in the event that Parker failed to make payments in the future and the Credit Union repossessed the vehicle. In addition, the Credit Union would have benefitted from the agreement's provision that Parker would pay most of his unsecured debt, which was otherwise dischargeable.

[3] Because the bankruptcy court refused to approve the agreement, Parker was able to keep the car and continue

to make payments, while the Credit Union could not hold him liable for the full amount of the debt. This essentially "forc[es] a quasi-reaffirmation upon the creditor," *Capital Communications Fed. Credit Union v. Boodrow (In re Boodrow)*, 126 F.3d 43, 47 (2d Cir. 1997) (quotations omitted), *cert. denied*, 66 U.S.L.W. 3474 (U.S. Feb. 23, 1998) (No. 97-1126), while the debtor need not reaffirm his obligation. Without the agreement, the Credit Union also could not hold Parker liable for any of his unsecured debt. As a result, the Credit Union's rights were "detrimentally " affected when the bankruptcy court refused to approve the agreement. *See id.* (court's refusal to approve affirmation agreement constitutes harm to creditor); *In re CFLC*, 89 F.3d at 675-76 (finding injury for standing to appeal when bankruptcy court denied assignment of a particular contract to purchaser of firm's assets, when purchase contract included right to assignment).[1]

---

[1]The BAP opinion assumes that the bankruptcy court denied a motion brought by Parker himself to approve the reaffirmation agreement, and that the Credit Union is therefore attempting to appeal a court order denying Parker's motion. *Parker*, 193 B.R. at 528.

The bankruptcy court, however, did not act pursuant to a motion filed by Parker. Instead, it ruled on the reaffirmation agreement because the court itself set the hearing to review whether it imposed an undue hardship on Parker or was in his best interest. The bankruptcy court concluded that under the agreement Parker gave up his rights to have the unsecured debt to the Credit Union discharged, and Parker could keep his automobile and

[4] We conclude that the Credit Union was an "aggrieved person" and had standing to appeal the bankruptcy court's refusal to approve the reaffirmation agreement.

II. *Alternatives for debtors under 11 U.S.C.S 521(2)*

Because we conclude that the Credit Union has standing, we review the bankruptcy court's refusal to approve the reaffirmation agreement. We are in as good a position as the BAP to review the bankruptcy court's decision, and so we review the decision independently. *Mitsui Mfrs. Bank v. Unicom Computer Corp. (In re Unicom Computer Corp.)*, 13 F.3d 321, 323 (9th Cir. 1994).

We now consider the legal issue whether the bankruptcy court erred in its conclusion regarding Parker's alternatives under § 521(2). The bankruptcy court held that even without a reaffirmation agreement, the law allowed Parker to keep the car and continue to make his monthly payments. The court reasoned that the reaffirmation agreement therefore was not in Parker's best interest under §

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continue to make payments without reaffirming his debt to the Credit Union. Therefore, the bankruptcy court decided that the agreement was not in Parker's best interest, and declined to approve the agreement. The Credit Union was present at the hearing and argued for the approval of the agreement. *See In re Commercial W. Fin. Corp.*, 761 F.2d 1329, 1335 (9th Cir. 1985) (attendance and objection should usually be required to fulfill "person aggrieved" status).

524(c)(6). On appeal, the Credit Union argues that because Parker could not simply keep his car and continue payment without a reaffirmation agreement such as the one the bankruptcy court refused to approve, the court erred in denying approval. We review the bankruptcy court's interpretation of the statute de novo. *Grey v. Federated Group, Inc. (In re Federated Group, Inc.)*, 107 F.3d 730, 732 (9th Cir. 1997). In this case, if the court's interpretation of the statute was correct, it clearly was within the bankruptcy court's discretion to deny approval of the reaffirmation agreement as not in Parker's best interest. Our decision therefore depends on whether the court was correct in concluding that, absent the agreement, Parker could retain the automobile as long as he continued to make the monthly payments, even though any deficiency debt was discharged.

11 U.S.C. § 521(2)(A) states that after filing a Chapter 7 petition, a debtor who has consumer debts secured by property of the estate shall file a statement of his intention to retain or surrender the property with the clerk and, "if applicable," specify that the debtor claims the property as exempt, plans to redeem the property, or intends to reaffirm the debts. The debtor must perform his expressed intention within 45 days. *Id.* § 521(2)(B). The circuits are evenly split on whether reaffirmation or redemption of nonexempt property are the debtor's only alternatives, or whether following a Chapter 7 filing, a debtor may simply hold on to the collateral securing the loan and continue making

payments, without electing whether to redeem the property or reaffirm the debt.

The Second, Fourth, and Tenth circuits have held that debtors who are current on their loan payments on secured property may elect to retain the property and make the payments specified in the contracts with the creditor. *In re Boodrow*, 126 F.3d at 53; *Home Owners Funding Corp. v. Belanger (In re Belanger)*, 962 F.2d 345, 347 (4th Cir. 1992); *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1547 (10th Cir. 1989). After a thorough review of the extant case law, the Second Circuit held that the statute "appears to serve primarily a notice function, not necessarily to restrict the substantive options available to a debtor who wishes to retain collateral securing a debt." *In re Boodrow*, 126 F.3d at 51. The Fourth Circuit concluded that the words "if applicable " mean that there are other options available to the debtor. *In re Belanger*, 962 F.2d at 348. The Tenth Circuit decided that the plain language of the statute was mandatory, but as the statute gives no power of enforcement, the bankruptcy court, in its discretion, may allow the debtor to keep possession of the property and continue to make payments: "[A]lthough we regard as mandatory the provisions of [§ 521], we do not believe those provisions make redemption or reaffirmation the exclusive means by which a bankruptcy court can allow a debtor to retain secured property." *In re Lowry*, 882 F.2d at 1547.

The Fifth, Eleventh, and Seventh circuits disagree,

holding that once the debtor decides to retain rather than surrender the property, he is restricted to the "applicable " options of claiming an exemption, redeeming the property, or reaffirming the debt. *Johnson v. Sun Fin. Co. (In re Johnson)*, 89 F.3d 249, 252 (5th Cir. 1996) (per curiam); *Taylor v. AGE Fed. Credit Union (In re Taylor)*, 3 F.3d 1512, 1516 (11th Cir. 1993); *In re Edwards*, 901 F.2d 1383, 1387 (7th Cir. 1990)."Permitting a debtor to retain property while keeping up installment payments without a reaffirmation of personal liability allows a debtor to force a new arrangement on a creditor. " *Id.* at 1386.

This court has not yet addressed the issue. Some bankruptcy decisions in this circuit agree with the Fifth, Eleventh, and Seventh Circuits. *See, e.g., Ford Motor Credit Co. v. Polk (In re Polk),* 76 B.R. 148, 150 (B.A.P. 9th Cir. 1987) ("If debtors enjoyed the right to redeem by installments at the fair market value, few would ever elect to reaffirm secured obligations under Section 524(c) since they would likely pay a higher price."); *In re Chavarria*, 117 B.R. 582, 584-85 (Bankr. D. Idaho 1990); *In re Stevens*, 85 B.R. 854, 855 (Bankr. D. Idaho 1988). A very recent decision of a divided Bankruptcy Appellate Panel of the Ninth Circuit, however, has held that § 521 does not limit the debtor's options. *Mayton v. Sears Roebuck & Co. (In re Mayton)*, 208 B.R. 61 (B.A.P. 9th Cir. 1997) (Meyers, B.J., concurring in the result). *In re Mayton* applied § 521(2)(C) when a debtor refused to choose one of the options in the statute:

> Subparagraph (C) states: "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title." . . . . A debtor otherwise may retain the collateral and continue to make the contract payments or go into default and risk foreclosure. Amazingly, courts restricting the debtor to redemption or reaffirmation refer not at all to subparagraph (C). Yet its meaning is plain, especially in the light of its location in a statute whose other paragraphs all relate to procedure and not substance.

Id. at 65-66. Reasoning that § 521(2)(C)'s statement that "nothing in subparagraphs (A) and (B) shall alter the debtor's . . . rights with regard to such property under this title" "preserves the debtor's property rights derived from the substantive provisions of the Code and specifically provides that subparagraphs (A) and (B) are subservient to it, " (citations omitted), the court concluded that reaffirmation and redemption are "voluntary" and that § 521(2) is "essentially a notice statute." *Id.* at 66-68. Relying on subparagraph (C), the BAP thus reached the same result as the Second, Fourth, and Tenth Circuits.

[5] In interpreting § 521(2), we begin with the plain

language of the statute. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990). We do not agree with the decisions of some of the other circuits that the language is ambiguous. The statute states that the debtor

> shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that the property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property.

11 U.S.C. § 521(2)(A). Our interpretation of that language is that the only mandatory act is the filing of the statement of intention, which the debtor "shall" file. Then, "if applicable," -- that is, if the debtor plans to choose any of the three options listed later in the statute (claiming the property as exempt, redeeming the property, or reaffirming the debt) -- the debtor must so specify in the statement of intention. The debtor's other options remain available, as unambiguously stated in § 521(2)(C): "[N]othing in subparagraph[ ] (A) . . . shall alter the debtor's or the trustee's rights with regard to such property under this title."

We see no reason to reach beyond this plain language. The legislative history is of little assistance in interpreting the congressional intent behind § 521. See the detailed

discussion of legislative history in *In re Castillo*, 209 B.R. 59, 68-71 (Bankr. W.D. Tex. 1997) (no member of Congress explained meaning of "if applicable," and scant legislative history of this section is a "less than satisfying source of information"), *rev'd, Government Employees Credit Union v. Castillo*, 213 B.R. 316 (W.D. Tex. 1997) (following *Johnson*).

[6] We conclude that Parker was not limited to reaffirmation or redemption of his debts with the Credit Union. The bankruptcy court's refusal to approve the reaffirmation agreement, as not in Parker's best interest, was thus within its discretion.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: DAVID P. PARKER., SR.,

Debtor.

MCCLELLAN FEDERAL CREDIT UNION,

Appellant,

v.

DAVID P. PARKER, SR.,

Appellee.

No. 96-15784

DC# EC-95-1829-RBMe

95-23730-C-7

ORDER

Before: D.W. Nelson, Boochever, and Trott, Circuit Judges

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judge Trott voted to reject the suggestion for rehearing en banc, and Judges D.W. Nelson and Boochever so recommended.

The full court has been advised of the suggestion for

rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges judges in favor of en banc consideration. Fed R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES BANKRUPTCY
APPELLATE PANEL
OF THE NINTH CIRCUIT

In re	)	BAP No. EC-95-1828-RBMe
DAVID P. PARKER, SR.,	)	BK. No. 95-23730-C-7
Debtor.	)	
_____	)	
MCCLELLAN FEDERAL	)	
CREDIT UNION,	)	OPINION
Appellant.	)	
v.	)	
	)	
_____	)	

Argued and Submitted on February 22, 1996
at Sacramento, California
Filed - MAR 14, 1995

Appeal from the United States Bankruptcy Court for the
Eastern District of California

Honorable Christopher M. Klein, Bankruptcy Judge,
Presiding

Before: RUSSELL, BARR[2], and MEYERS,
Bankruptcy Judges.

RUSSELL, Bankruptcy Judge:

An in propria persona chapter 7[3] debtor filed a motion to reaffirm a secured car loan and an unsecured credit card debt owed to the same creditor. The bankruptcy court denied the debtor's motion. The creditor appeals. We DISMISS because the creditor lacks standing to bring this appeal.

I. FACTS

On April 28, 1995, David P. Parker, Sr., an in propria persona debtor ("debtor"), filed a chapter 7 bankruptcy petition along with a statement of intention pursuant to § 521(2)(A).

On June 21, 1995, the debtor filed a motion to reaffirm his debt with McClellan Federal Credit Union ("McClellan" or "creditor"). The reaffirmation agreement ("agreement") included two separate obligations, one an

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[2]Hon. James N. Barr, Bankruptcy Judge for the Central District of California. sitting by designation

[3]Unless otherwise indicated, all chapter, section and Rule reference are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and the federal Rules of Bankruptcy Procedure, Rules 1001-9036.

unsecured credit card debt in the amount of $1,986.50 and the other a secured debt in the amount of $9,977.56. The latter was secured by an automobile with a fair market value of between $9,000 and $10,000, and the debtor was current on these payments.

On July 19, 1995, at the reaffirmation hearing, the bankruptcy court denied the debtor's motion on the ground that the debtor was current on his secured payments and, therefore, it was not necessary to reaffirm the secured debt.[4] With respect to the unsecured debt, the bankruptcy court concluded that the debtor could continue to make payments to McClellan if he elected to do so, but the court would not order it.

On August 18, 1995, the bankruptcy court granted the debtor a discharge. McClellan appeals the bankruptcy court's order denying the debtor's motion to approve the reaffirmation agreement.

II. ISSUE

Whether a creditor, whose debt the debtor has agreed

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[4]The bankruptcy court's reasoning appears to be based upon a line of cases holding that under § 521(2) (A), a nondefaulting debtor need not affirm, redeem or surrender the collateral, but may retain it and continue making payments. *In re Weir*, 173 B.R. 682, 692 (Bankr. E.D. Cal. 1994); *see also In re Belanger*, 962 F.2d 345 (4th Cir. 1992) ; *Lowry Fed. Cred. Union v. West*, 882 F.2d 1543 (10th Cir. 1989).

to reaffirm, has standing to appeal the bankruptcy court's order denying the debtor's motion to approve the reaffirmation agreement.

III. STANDARD OF REVIEW

Standing represents a jurisdictional requirement which is open to review at all stages of the litigation. *National Org. For Women, Inc. v. Scheidler*, __U.S.__, 114 S.Ct. 798, 802 (1994). Whether an entity has standing to appeal is a question of law reviewed de novo. *Barrus v. Sylvania*, 55 F.3d 468, 469 (9th Cir. 1995) ; *see also Board of County Comm' rs v. W. H. I., Inc.*, 992 F.2d 1061, 1063 (10th Cir. 1993).

IV. DISCUSSION

McClellan's standing to appeal

The Ninth Circuit has adopted the'"aggrieved person" test for determining whether an entity has standing. *Matter of Fondiller*, 707 F.2d 441, 443 (9th Cir. 1983). Under the aggrieved person standard, only those persons who are directly and adversely affected pecuniarily by an order of the bankruptcy court have standing to appeal that order. Id. at 442. The appellant must demonstrate that the order diminished its property, increased its burdens or detrimentally affected its rights. *Id.*

To have standing to appeal, an appellant must also assert that its own legal rights and interests were directly

affected by the order. An appellant cannot rest his claim for relief on the legal rights or interests of another. *Umpqua Shopping Ctr.* 111 B.R. 303, 305 (9th Cir. BAP 1990) (*citing Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975)).

Although McClellan was a party to the debtor's proposed reaffirmation agreement, it does not appear that McClellan was adversely affected pecuniarily as a result of the bankruptcy court's order. Even though the agreement was not approved, the debtor remained obligated to repay his secured debt to McClellan or surrender the collateral in satisfaction of the debt. § 521 (2) (A). The order did not detrimentally affect a "right" by McClellan to receive payment on the unsecured debt because while the agreement may have provided for this debt to be repaid, McClellan did not have a right to this payment because the unsecured debt, was otherwise dischargeable.[5] Merely being a party to the agreement did not confer standing on McClellan to appeal the

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[5]The creditor also contends that by allowing the debtor to retain the property and to continue making payments, we are in effect allowing the debtor to redeem the property by installment which is not allowed by § 722.

In response, we note that the issue of redemption is not before this Panel because the appellant did not present it as a formal issue on appeal. In addition, under § 722 the debtor is only required to pay the creditor the market value of the collateral. *See, e.g., In re Avila*, 83 B.R. 6, 7 (9th Cir. BAP 1987). Here, the debtor is paying the creditor in full according to the terms of the original agreement.

bankruptcy court's order.

In addition, the substance of McClellan's argument on appeal is that the agreement should have been approved because it satisfied the requirements of § 524 (c) (6) (A)[6], namely, that the agreement was in the debtor's best interest and that it did not impose any undue hardship on the debtor. In sum, McClellan's appeal is based entirely on its assertion that the agreement benefitted the debtor's interests and, therefore, should have been approved. While the debtor could have prosecuted this appeal based upon whether the agreement was in his best interest, McClellan cannot. *See Umpqua Shopping Ctr.*, B.R. at 305 (holding that a debtor

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[6]524. Effect of Discharge.

. . . .

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if --

. . . .

(6) (A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as --

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

. . . .

cannot appeal a confirmation order on the basis that it unfairly discriminates against a class of claims). Standing requires that an appellant rest its claim for relief on its own legal rights or interests.[7] *Id.* at 305.

We conclude that McClellan lacks standing to appeal because it is not an aggrieved entity under the Fondiller standard and because its claim for relief rests on the interests of the debtor.

V. CONCLUSION

Just as the right to seek approval of a reaffirmation agreement lies solely with the debtor, it also appears that it is the debtor's exclusive right to appeal an order denying his motion to approve a reaffirmation agreement. Fed. R. Bank. P. 4008.[8] We therefore conclude that McClellan lacks standing to bring this appeal. Accordingly, we DISMISS.

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[7]Although it is not in the record, the creditor asserted at oral argument that it would be aggrieved if the reaffirmation agreement with the debtor was not approved because the creditor would be forced to report the debt to certain regulators.

[8]Rule 4008. Discharge and Reaffirmation Hearing.

Not more than 30 days following the entry of an order granting or denying a discharge, or confirming a plan in a chapter 11 reorganization case concerning an individual debtor and on not less than 10 days notice to the debtor and the trustee, the court may hold a hearing as provided in § 524 (d) of the Code. A motion by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing (emphasis added).